In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANTS,
v.
THE OMAHA TRIBE OF INDIANS. } No. 243.

THE OMAHA TRIBE OF INDIANS,
v.
THE UNITED STATES. } No. 244.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal and cross appeal from a judgment of the Court of Claims.

The suit arose under and by virtue of the act of Congress of June 22, 1910 (36 Stats., 580), set forth in Finding I (R., p. 15), granting to the Court of Claims jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States * * * under the treaty between the United States and the said tribe of Indians, ratified and affirmed March 16, 1854, or

under any other treaties or laws, or for misappropriation of any funds of said tribe not for its material benefit, or for failure of the United States to pay said tribe any money due."

On June 10, 1918, the Court of Claims awarded judgment in favor of the tribe in the aggregate sum of $122,295.31 upon five separate items as set forth in Findings III, V, VII, VIII, and IX (R. pp. 16–18). From this judgment the United States appealed on July 12, 1918.

The principal reason for the Government's appeal lay in the award to the tribe for the value of the excess land "north of said due west line" (Finding III), it having been contended in the court below that the Omaha Tribe owned none of said land. Finding III does not set forth the facts as the United States view them with respect to this question of the possessor of the Indian title to this land "north of said due west line," and a motion was therefore made for an order remanding the case to the Court of Claims with directions to make findings on the question. This motion was overruled by the court on March 2, 1920, and the Government is therefore not in a position to contest the correctness of the judgment upon this item, except in the event that this court should allow the motion of the appellant in case No. 244 and direct the Court of Claims to certify the whole record to this court. If that motion should be allowed, the Government desires to present this question to the court, as it is convinced that the record abundantly shows that the Indian title

to the tract in question at the time of the treaty of 1854 was in the Ponca Tribe.

The other grounds for appeal are to be found in the action of the court in awarding judgment in favor of the tribe upon the facts set forth in Findings V, VIII, and IX.

FINDING V (R. p. 17).

It is submitted that the court below erred in two respects in awarding judgment upon the facts set forth in this finding:

First, by Article VII of the treaty of 1854 the United States agreed to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." It is, of course, to be presumed that the President knew and performed his duty under the treaty. The finding states that "no protection of any kind was afforded the Omahas by the United States," which means, of course, that the President did not "deem" any protection necessary. Whether or not the President was wrong in his conclusion is beside the question. It was purely a matter of discretion; and the manner of its exercise by the person in whom it was lodged can not be brought into question.

Second, assuming that the furnishing of protection was not discretionary with the President, the Government contends that there was no liability on its part under the treaty to respond in damages for the failure to protect the Omahas. If there was no liability under the treaty, the jurisdictional statute

created none. (*United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 500.) The court, therefore, erred in awarding judgment on this account.

Article 7 of the treaty, it is true, contains a promise from the United States to protect the Indians, but it is not a promise at the same time to pay for the damages which might result from failure to protect. In this aspect the case is similar to that of *Leighton* v. *The United States*. (161 U. S. 291.) In that case, in the treaty between the United States and the Ogalalla Band of Sioux Indians which was under consideration by the court, the Indians bound and obligated "themselves individually and collectively" to "cease all hostilities against the persons and property" of citizens of the United States; but they did not at the same time obligate themselves to pay for the damages which might ensue if they did not keep the peace. Construing this promise to keep the peace, this court said:

> Now, if this treaty was not entirely superseded by hostilities which actually existed between the Ogallalla Indians and the United States, as is undoubtedly the rule when war arises between absolutely independent nations, it still is far from a promise on the part of the Indians to pay for damages caused during any such hostilities. While a breach of a contract similar to this between individuals might very likely give rise to an action for damages, yet no such rule can be enforced in reference to obligations created by a treaty.

> It is a promise on the part of the tribe to keep the peace, and not a promise to pay if the peace is not kept. Especially should this be the construction in view of the fact that many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise. The absence of any such express provision in this treaty, the Indians being under the care of the United States and its wards, renders it improper to hold that by its terms the tribe had bound itself to pay for all damages which it might cause during a period of actual hostilities. (Id. 296.)

If a promise in a treaty by an Indian tribe to do or not to do certain things does not carry with it an obligation to pay the damages resulting from its breach, *unless such a liability is expressly stipulated for in the treaty*, it is difficult to see why such an obligation should be imposed upon the United States for its failure to keep a promise of the same character, in the absence of an express stipulation.

As pointed out in the quotation above, the court's decision was strengthened by the fact that many treaties of the kind there under consideration contained a specific promise to pay. In the great majority of instances where the United States by treaties with numerous Indian tribes, covering a period from 1798 to 1868, promised to protect the Indian parties thereto from aggressions either by its

own citizens or by Indians of other tribes, there was also a specific promise to indemnify the Indians for losses of property resulting from such aggressions. (See 7 Stats., pp. 62, 84, 176, 244, 247, 250, 252, 255, 257, 259, 261, 264, 266, 277, 279, 282, 286, 450, 474, 533; 10 Stats., pp. 1013, 1018, 1027; 11 Stats., pp. 611, 699; 13 Stats., p. 673; 14 Stats., pp. 683, 703, 717, 755, 785, 799; 15 Stats., pp. 581, 593, 619, 635, 649, 665, 667, 673.) Such a course indicates, as intimated by this court, a settled policy on the part of the United States not to respond in damages for a breach of a promise of this sort unless there be also a specific stipulation to that effect.

FINDING VIII (R. p. 18).

Under Article II of the treaty of 1865 (14 Stats. 667) the United States agreed to pay to the Omahas $50,000, to be expended "for goods, provisions, cattle, horses," etc.; and Finding VIII shows the facts with reference to the expenditure of a part of this sum for cattle. The finding states that *when the cattle reached the reservation* they were in bad condition, etc. It can, therefore, be assumed that the cattle *when purchased* were in good condition and that their defective condition when they reached the reservation was due to the rigors and hardships of the drive from the market to the reservation. The article of the treaty referred to did not make the United States insurers of the cattle, did not stipulate that sound cattle should be delivered to the Indians at the reservation. The utmost duty that the article imposed upon the United

States was to purchase cattle in the market and deliver them on the reservation, exercising over the cattle during the drive from the market to the reservation only a proper and reasonable degree of care. There is nothing in the finding to show that the United States failed in its duty in this respect. The finding simply states that *when the cattle reached the reservation* they were in bad condition. But what caused that "bad condition" the finding does not show. Unless that condition was due to the fault or neglect of the agents of the United States in caring for the cattle during the drive, the loss must be borne by the Indians.

FINDING IX (R. p. 18).

Article 4 of the treaty of 1854 (10 Stats. 1043) provides that in the discretion of the President part of the money consideration may be expended for—

> their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, etc.; for clothing, provisions, and merchandise; for iron, steel, arms, and ammunition; for mechanics and tools; and for medical purposes.

Article 2 of the treaty of 1865 (14 Stats. 667) provides for the expenditure of $50,000—

> for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up land, and other improvements on their reservation.

Finding IX shows that the United States in 1875 erected an infirmary on the Omaha and Winnebago consolidated reservation, part of the cost of which was paid out of Omaha funds. The finding states further that—

> It was not such a building as was contemplated by the treaties between the United States and the Omaha Tribe of Indians.

If there was any authority for the expenditure of Omaha funds for this hospital, it is to be found in the articles from the treaties quoted above. These treaties are a part of the record before this court, and it can, therefore, very readily and properly decide for itself whether the conclusion of the court below that the hospital "was not such a building as was contemplated by the treaties" is correct. The only limitation upon the construction of buildings which should be read into the treaties is that they must be for the material benefit of the tribe, and it seems obvious that a hospital falls within that category. The court below further finds that the building was not used. Whether the court means to infer by that that if the tribe had been so unfortunate as to require its use and had used it the conclusion would have been different, does not appear; but it is submitted that its use or nonuse has no bearing on the subject.

Furthermore the use of Omaha funds in paying for the erection of a hospital would seem to be justified by the language quoted above from the treaty of 1854 authorizing the President to expend some of this

money for "such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes."

CROSS APPEAL.

STATEMENT.

At the time of printing this brief, the brief of the appellant tribe on its cross appeal has not been received. However, from the brief filed by the tribe in opposition to the motion of the United States for an order remanding case No. 243 to the Court of Claims for further findings of fact, and from the motion of the appellant tribe in this case for an order on the Court of Claims to certify the whole record to this court, it is to be gathered that in the tribe's opinion the court erred—

1. In not finding that the Omaha Tribe had the Indian title to a larger area of country "north of the said due west line" and in not awarding it judgment for this larger area.

2. In not finding in its favor upon other claims set forth in its petition.

3. In not allowing interest upon the amount found in Finding III as the value of the land owned by it "north of the said due west line."

ARGUMENT ON CROSS APPEAL.

Interest.

The only one of these three matters which is properly before the court on this cross appeal is the last, the failure of the Court of Claims to allow interest;

and as to this the appellant tribe argues in brief that this is an equity suit for an accounting; that the money due it for the lands ceded by it "north of the said due west line" under the treaty of 1854 should have been placed after the treaty in the Treasury of the United States at interest to its credit, and that "the United States having acquired this land in trust for the Omahas and never having paid for same should, as trustee, be required on settled equity principles to account for the same, with interest."

Section 1091 R. S. (Judicial Code, section 177) provides—

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for payment of interest.

Neither the treaty of 1854 (10 Stat. 1043) nor the jurisdictional act of June 22, 1910 (36 Stat. 580), provides for the payment of interest on the purchase money for the lands "north of the said due west line."

In *United States* v. *North Carolina* (136 U. S. 211, 216) this court said:

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has

> been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *In re Gosman*, 17 Ch. D. 771.

And in *Harvey* v. *The United States* (113 U. S. 243, 248) appears the following:

> The only remaining question is as to interest, which the Court of Claims disallowed. We think that, under the ruling in *Tillson* v. *United States*, 100 U. S. 43, interest can not be allowed on either of the items in question. We do not see anything in the special statute, act of August 14, 1876, ch. 279, 19 Stat. 490, which takes the case out of the rule prescribed by Section 1091 of the Revised Statutes.

These cases and this section of the Judicial Code would seem to be conclusive of the question. But the appellant tribe argues that as the special statute of June 22, 1910, expressly provides that the Court of Claims shall have jurisdiction to determine "all claims of whatsoever nature" of the tribe against the United States and that "all legal and equitable claims" by either party against the other shall be finally determined, and that as this is an equity suit for an accounting, it is entitled to interest on the said principal sum. Both the *Harvey* and the *Tillson* cases above referred to arose under special acts of Congress equally as broad in their scope as the act in this case. In the *Tillson* case the Court of Claims was directed to "adjudge the amount equitably due

said firm" and in the *Harvey* case to "proceed in the adjustment of the accounts between the said claimants and the United States as a court of equity jurisdiction" and to render judgment in accordance with "the rules and principles of equity jurisprudence." Notwithstanding the language of these two acts this court declared that no interest could be allowed the respective claimants on their claims.

THE ERROR BY THE COURT OF CLAIMS IN NOT ALLOWING FOR MORE LAND IN FINDING III.

This question is not before the court on the present record, as the facts found by the Court of Claims do not disclose any error in this respect. It depends for its solution upon the allowance of the motion made by the appellant tribe and upon an examination of the record which was before the Court of Claims.

If this motion is allowed and the whole record certified to this court, the Government insists that the Court of Claims erred, not in failing to find that the Omaha Tribe owned a greater number of acres "north of the said due west line," but in finding that that tribe owned even the 783,365 acres stated in the finding, as the controlling evidence in the case shows that the tribe owned no land "north of the said due west line" or at most only such area as lay between that line and parallel 42°, 40′, north latitude. This latter area has been computed by the Interior Department to include a total of 327,680 acres. Consequently the tribe is entitled to nothing on this item of their claim, or at most to a judgment for the value

of the difference between 327,680 acres and 300,000 acres at 19.6 cents per acre or $5,425.28 instead of $94,739.54 allowed by the Court of Claims.

By Article I of the treaty of 1854, set out in full in Finding II (R., p. 16) the United States agreed upon the happening of a certain contingency, which did come to pass, that it would pay the tribe for all land "north of the said due west line" belonging to them, less 300,000 acres. What were the eastern, western, and northern boundaries of this cession the treaty does not disclose. As far as that instrument is concerned the northern boundary might have been as far north as the Canadian line. Even the findings of the court below fail to state these boundaries, but evidently the court adopted the Missouri River as the eastern and northern boundary and the eastern boundary of the Pawnee country as the western boundary of this cession. How the court arrived at the stated number of acres the appellees do not know.

The treaty itself being silent on the point, it is necessary to go outside of that instrument for a definition of the tract.

In its opinion the court below holds (R., p. 19):

> *At the time the treaty was made* the United States recognized the Omahas as having title to this land north of the said due-west line, and specifically promised to pay for it. (Italics ours.)

And holds further that "the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right

to make a cession to it" (Id.). If the premise upon which this latter statement is based had been true, i. e., that the United States *at the time the treaty was made* recognized the Omahas as having title to the tract in question, then the decision of the court, in line with such cases as *Fellows* v. *Blacksmith et al.* (19 How. 366, 372), and *Worcester* v. *Georgia* (6 Pet. 515, 583), would no doubt be correct.

But what is the basis for the court's statement that the United States *at the time the treaty was made* recognized the title as being in the Omahas? As pointed out just above, such recognition can not be found in the treaty itself, for that instrument is silent on the point. There is nothing else in the record to show to what extent of country north of this line the United States *at the time of the treaty* recognized the Omahas as possessing the title.

There being nothing in the treaty delimiting this area and there being nothing in the record to show the extent of the recognition on the part of the United States *at the time of the treaty*, the Government submits that it is not estopped from showing the actual extent of this section and from contesting the extravagant claims of the Omaha Tribe in this regard.

The first recognition, if such it can be termed, of the alleged Omaha title to this section is found in the so-called "Eastman" map prepared some months after the treaty and attested by Commissioner of Indian Affairs Manypenny on August 5, 1854, as being correct. This map gives the Missouri River as the eastern and northern boundaries. Why, or upon

what authority, Capt. Eastman did so does not appear. But this map is discredited not only by the subsequent corrections made upon it but by the declaration of the same Commissioner of Indian Affairs who attested its correctness.

Next in point of time is the declaration just above referred to, on November 25, 1854, of Commissioner Manypenny, the official who negotiated the treaty with the tribe, to the effect that during the past season he had concluded treaties with a number of Indian tribes, including the Omahas, under which the Indian title to a vast tract bounded on the east by the States of Missouri and Iowa and "lying between the parallels of 37° and 42° 40′ north latitude" had been extinguished (Rept. Sec. Int. 1854, p. 213). This is the first statement in the record by the official who represented the United States in making the treaty; it is submitted that if any statement with reference to the extent of the Omaha title made *after* the treaty is binding upon the United States it is this. According to the commissioner's statement, the northern boundary of this tract is placed considerably to the south of the Missouri and Niobrara Rivers; and the area included between parallel 42° 40′ north latitude on the north and the due west line on the south amounts, as stated hereinbefore, to 327,680 acres.

Furthermore, the fact that, if the Omahas did not elect to settle in the country "north of the said due west line," they were to receive as a reservation 300,000 acres south of this line seems significant of a

belief on the commissioner's part that the extent of the country north of that line to which they had title amounted approximately to that acreage.

The objection that this parallel is an artificial boundary and not such as would naturally be adopted by Indians, who ordinarily follow watercourses and other natural landmarks in fixing the limits of their territory, is not sound. Many treaties with the Indians in demarcating their country follow lines quite as artificial, and in fact the western boundary of this tract in dispute is also an artificial one.

What happened *after* the treaty, while it may be explanatory of the situation, is not conclusive. The Omahas, of course, could not pass title by the treaty to something which they did not own, and the United States by the treaty simply agreed to purchase such country north of this line as the tribe actually owned. The treaty being silent on this point, the question should be determined, the appellees submit, by contemporaneous and antecedent evidence. According to that evidence the Omaha Tribe prior to the treaty of 1854 never owned or claimed to own any country north of Ayoway Creek. On the contrary, all of this section north of this creek belonged by the Indian title of occupancy and possession to the Ponca Tribe.

It may be here stated that prior to 1854 the Omaha claimed as their northern boundary, not the Missouri River as is apparently assumed by the court, but "the Ponca country." For instance, in 1842 their agent reported that the country claimed by them was

bounded by the Missouri River on the east, by Shell Creek on the west, by the River Platte on the south, and on the north by "the Ponca country" (Rept. Comr. Ind. Affrs., 1842, p. 439); and in 1853, just prior to this treaty, their agent reports that "their country extends from Council Bluffs, on the Missouri River, up to the Puncas, and is immediately in front of the white settlements in the western countries of Iowa" (Rept. Comr. Ind. Affrs., 1853, p. 345). It is significant that if the Omaha country had been bounded on the north by such distinct boundaries as the Missouri and Niobrara Rivers, these rivers were not named as that boundary instead of such an indefinite term as "the Ponca country."

According to the Lewis and Clarke map accompanying the report of that expedition in 1804, the Poncas lived on both sides of the Niobrara River and the Omahas on the Missouri River about the site of their present reservation.

The Nicollet map, published in 1843, places the Omahas south and the Poncas north of parallel 42° 40′ north latitude, one Ponca village being located to the east of the mouth of the Niobrara River and within the disputed tract.

The "Map of the Trans-Mississippi Territory of the United States during the period of the America Fur Trade, 1807 and 1843" places the Omahas in the vicinity of Blackbird Hills, where their present reservation is located, and the "Ponca Post" to the east of the Niobrara at its mouth.

In 1851 Superintendent Mitchell, preparatory to negotiating treaties of peace with various plains tribes, requested Father De Smet, the famous Jesuit missionary and a man possessed possibly of more information with reference to the Indians of this section of the United States and the territory occupied by them than any other man of his time, to make a map demarcating the various tracts claimed by the several tribes. With reference to the map thus prepared Superintendent Mitchell stated that he considered it "one of the most accurate maps of that section of the country yet constructed." The original of this map is now in the Library of Congress. Father De Smet was personally acquainted with the Poncas and visited them in their country in 1847. According to his map the Poncas were located in a section of country including the disputed tract and the Omahas to the south of it.

On pages 377 to 386 of the record in the court below are references to various publications, such as Lewis and Clarke's "Journal," "History of the American Fur Trade of the Far West," Bradbury's "Travels in America," "Travels in America" by Maxmillian, Prince of Wied; "Forty Years a Fur Trader on the Upper Missouri" by Larpenteur—all published or referring to events occuring prior to 1854. The appellees will not refer to these publications in detail but will state that the citations therefrom appearing on these pages show conclusively that the Ponca Tribe roamed over, hunted in, and claimed

the identical tract of country for the value of which the Court of Claims has awarded the Omaha Tribe judgment. This claim, as is shown in the record below, was subsequently recognized by the United States in the treaty of 1858 with the Ponca Tribe (12 Stats. 997).

There is an abundance of other evidence on this question in the record below, consisting of maps and declarations made after the treaty of 1854 and of oral testimony by members of the Ponca and Omaha Tribes, to which the appellees do not further refer here for the reason that they believe that this question should be resolved, as stated, in the light of the contemporaneous and antecedent evidence. That evidence in the appellees' opinion shows that the Indian title to this disputed tract was in the Ponca Tribe.

If, however, this court should conclude that the appellees are estopped from denying that the United States by the treaty recognized the Omaha Tribe as possessing title to *some* land "north of the said due west line," it is then submitted that the extent of that recognition is limited by the first declaration of the United States upon that subject. This, as stated hereinbefore, is found in Commissioner Manypenny's report of November 25, 1854, to the effect that the northern boundary of the Omaha cession was parallel 42° 40′ north latitude. Upon this basis the tribe is entitled to judgment for the value of 27,680 acres and no more.

THE ERROR BY THE COURT OF CLAIMS IN NOT FINDING IN FAVOR OF THE TRIBE UPON OTHER ITEMS IN THIS PETITION.

The appellees are unaware of any error by the Court of Claims in this respect; and as the appellant tribe's position with reference thereto has not as yet been set out, the appellees will be obliged to defer a discussion of this heading until the trial.

CONCLUSION.

In conclusion it is submitted that the Court of Claims erred in awarding judgment to the Omaha Tribe of Indians upon the facts set forth in Findings V, VIII, and IX, and to that extent the judgment of the Court of Claims should be reversed for the reasons above stated. That the Court of Claims did not err in refusing to allow interest upon the amount found as the value of the land "north of the said due west line" and that its judgment in this respect should be affirmed. If the motion of the appellant tribe is allowed, the judgment of the court below should be re-formed in accordance with the argument above made.

Respectfully submitted.

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MARCH, 1920.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

Nos. 243 and 244.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS, APPELLEE,

AND

THE OMAHA TRIBE OF INDIANS, APPELLEE,

vs.

THE UNITED STATES, APPELLEE.

BRIEF OF THE OMAHA TRIBE OF INDIANS.

The foregoing appeals are by the United States and the Omaha Tribe of Indians respectively from a judgment (Trans. Rec., p. 20), rendered by the Court of Claims June 10, 1918, in favor of the Indians for $122,295.31, in a suit by the tribe against the United States (Rec., p. 1), the Court of Claims rejecting a counter-claim in the sum of $58,800 by the United States (p. 13), on which the tribe had joined

issue by replication (p. 14), the United States, pursuant to the provisions of the jurisdictional act, having by its counterclaim alleged the Omahas had sold the United States land which belonged to the Ponca Tribe of Indians (p. 14), which alleged ownership by the Ponca Tribe of Indians the Court of Claims rejected, finding (Finding III, p. 16), after full evidence taken and reviewed, that the land in question, being an area between a line drawn due west from Ayoway Creek, in eastern Nebraska, on the south and the Missouri River on the north "belonged" to the Omahas at the date of the treaty with the Omaha Tribe in March, 1854. The Omahas contend their northern boundary included not only the Missouri River, but a part of the Niobrara River as well.

The appeal of the United States, no assignments of error having yet been furnished counsel for the Omahas, presumably is based on a contention that the Court of Claims erred as "matter of fact" in finding that the land involved in the litigation "belonged" to the Omaha Tribe, the United States having unsuccessfully sought to convince the Court of Claims that the land "belonged" to the Ponca Tribe, and having thereafter by a perversion of the findings of fact of the Court of Claims unsuccessfully endeavored by motion to have this court refer the cause back to the Court of Claims to find that which it already has found as a fact, namely, that the land involved "belonged" to the Omaha Tribe, the United States seeking to contend the finding of the Court of Claims was a finding of law based on the language of the Omaha treaty of 1854, whereas the lower court made a "finding of fact" based on the Omaha and other Indian treaties, government and other maps, records made by earlier and contemporaneous (with the treaty) officials of the United States, historical data, and oral testimony.

The appeal of the Omaha Tribe, conceding, *arguendo*, only the correctness of the findings of fact limiting the Omahas' territorial rights to the area (erroneously stated at 483,365 acres) between the Ayoway Creek line on the south and the

Missouri River on the north, is that the Court of Claims erred in denying the tribe interest on the value of the above land taken over in trust by the United States and never paid for and also erred in denying the tribe interest on some $18,-202.19 (Findings of Fact IV and VII, pp. 17, 18) which the court found should have been expended by the United States for the material benefit of the claimant Indians, but never had been expended for them owing to misappropriation of funds by the United States Indian agents. Also that under the guarantee of protection given them by the United States (Finding V) they were entitled to be paid for tribal members killed and wounded.

The Court of Claims in its original opinion, rendered April 22, 1918 (furnished counsel by the court in pamphlet form and a copy of which counsel now has), allowed the Omahas interest on both the land claim, fixed by the court below at $94,739.54, and on the claims for monies never received though paid to Indian agents of the United States, the Court of Claims in its original opinion, after stating its findings of fact, saying:

> "Conclusion of Law. Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the amount shown in Finding III, to wit, the sum of $94,739.54, with interest at 5 per cent per annum from June 15, 1854; * * * the amount shown in Finding VII, to wit, the sum of $18,202.19, with interest at 5 per cent per annum on $15,068.80, part thereof, from August 3, 1856, and on $3,133.39, the residue thereof, from August 11, 1858."

The Court of Claims judgment followed its Conclusion of Law and read:

> "A judgment will therefore be entered for the sum of $122,295.31, with interest at the rate of 5 per cent per annum on $94,739.54 from June 15, 1854, and

on $15,068.80 from August 3, 1856, and on $3,-133.39 from August 11, 1858. It is so ordered."

The United States moved for a new trial because of the adverse findings of fact and also on the ground that the Court of Claims by the statute of its creation, re-enacted as section 177 of the Judicial Code, was forbidden to allow interest except from the date of its judgment. The lower court summarily denied so much of the motion as related to the Findings of Fact and granted the motion, without argument, as to interest. The claimant Indians moved the Court of Claims to certify the whole record to this court on the ground the cause was an equity cause, entitling them to have the whole record reviewed, and that on the land claim they had been allowed several hundred thousand acres less than their land area north of the Ayoway Creek line, and the price had been erroneously lowered. They also specifically moved the court to have the record show the court's original findings and conclusion and judgment of date April 22, 1918, with the interest provisions, and also claimant's motion of June 10, 1918 (History of Proceedings, p. 15), but the court denied the same.

Claimant Indians have moved this court to certify the whole record for review and this court has postponed action thereon pending hearing on the merits. Claimant Indians press the motion, believing its grant will largely increase their recovery, or, in the alternative, if an undue burden would result to this court, that directions be given the Court of Claims, as hereinafter set forth more at large, to further review the cause.

In view of the fact that the cause is one under a special act of Congress for a general settlement and accounting, to wind up once for all time, as stated in the Congressional report on the bill enacted into law, referring the case to the Court of Claims with the right of appeal to this court (House Report No. 7614, Fifty-ninth Congress, and House Report

No. 1427, Sixtieth Congress), the claims between the tribe and the United States prior to the expiration of the tribal trust-patents period, with jurisdiction to determine "all legal and equitable claims" of the tribe and "any legal or equitable defense, set-off, or counterclaim" of the United States, any judgment rendered to be a "final settlement," claimant Indians contend that they are entitled to a full review of their case unhampered by the general statutory provision limiting the authority of the Court of Claims and prohibiting, in general, allowance of interest by it. The purpose of Congress was not to hold open for the future any claim for interest or anything else, and liberally interpreted, in accordance with the spirit and expressed intendment of the act and the trust relationship of the United States to the land acquired and the Indians, the cause should be decided as would be any cause in equity rather than a case at law encased in restrictive general statutory provisions. The Court of Claims took too limited a view of the act, of the powers of this court under the Constitution, and of the intent of Congress.

The claims are in part of an equitable and trust nature and the cause as a whole involves such an accounting as under general principles of jurisprudence is proper for equity rather than a court of law and a jury. The United States *vs.* Old Settlers, 148 U. S., 427.

As the claims are separate and distinct, counsel hereafter will state the facts and law applicable to each under the findings of fact below, after making an assignment of errors as required by the rules, and in conclusion will treat of the matter reserved by the ruling of this court on the motion of claimant Indians that the whole record be certified.

Assignment of Errors.

The Omaha Tribe of Indians, appellant in No. 244 and appellee in No. 243, for cause of appeal state that the court below erred as follows:

1. In that it failed to allow in its final judgment interest on the sum of $94,739.54 found by it to be due claimant Indians for lands acquired by the United States under the treaty of March 16, 1854, and never accounted for.

2. In that it failed to find the United States acquired the lands north of Ayoway Creek from claimant Indians with a trust thereupon and should account therefor for the minimum amount received on sale of said lands, namely, $1.25 an acre.

3. In that it failed to allow in its final judgment interest on the sum of $18,202.19 which it found to be a balance unexpended by the United States of the $41,000 the United States agreed to expend for the benefit of the Omaha Tribe of Indians under article 5 of the treaty of March 16, 1854 (findings 4 and 7).

4. In that it refused and failed to certify the whole record in the cause to this court.

5. In that in fixing the area of lands for which the United States should account it adopted as the western boundary line of the Omaha lands under the treaty of 1854 a due north and south line drawn from the junction or confluence of the Niobrara River with the Missouri River, as shown on the map drafted by Eastman and signed by Indian Commissioner Manypenny in August, 1854, notwithstanding Commissioner Manypenny's written official statement in 1856 that said western line had been drawn only provisionally or tentatively pending a more accurate delimitation of the boundary line between the Omahas on the west and the Pawnees on the east and that by the Pawnee treaty of September 24, 1857 (11 Stat., 729; 2 Kappler Indian Laws and Treaties, Art. 1), both the Pawnee Tribe and the United States acknowledged that the Pawnee eastern boundary line did not extend as far east as the junction or confluence of the

Niobrara River and the Missouri River, but was west of said confluence on the Niobrara River before the Niobrara, flowing west to east, had yet reached the Missouri River.

6. In not finding that the Omaha-Pawnee boundary line was not a mathematical longitudinal due north and south line, but was a line that followed streams from where their mouth was in the Platte River, which was the common southern boundary line of each of the tribes, and ran with the course of the stream in a northwesterly direction, the boundary line in the Platte being either Shell Creek or Beaver Creek (this being a point of contention between the two tribes) and then when these streams near their headwaters ran close to streams flowing north into the Elkhorn (the principal stream of the Omahas and along whose banks they had villages since the memory of man runneth not to the contrary), followed the Elkhorn northwesterly to the sand hills where the buffalo abounded beyond the town of O'Neill, Nebraska, and thence north through the unwatered sand hills to a point, not then surveyed, on the Niobrara River, as shown by the Pawnee treaty, and thereafter going east by the Niobrara and Missouri Rivers to the Platte River as the southeastern boundary point, the lands north of a due west Ayoway Creek line so drawn aggregating 1,300,000 acres as found by the General Land Office.

7. In finding the area within the lines as shown on the Manypenny map by following the errors as to latitude made by Manypenny in the absence of surveys as to the location of Ayoway Creek, the Missouri River to the north and the confluence of the Niobara and the Missouri Rivers at the northwest and a west line drawn therefrom and adopting the General Land Office calculations of the areas as so shown of 783,365 acres north of Ayoway Creek and approximately 4,500,000 acres as the total Omaha area while refusing to accept the General Land Office price on the basis of such acreage of 25 cents per acre as the price due, if the United

States were liable (Report of Assistant Commissioner Proudfit, of General Land Office, of July 15, 1911, Original Record, pp. 297-98, and instead, while retaining the above excess acreage of 483,365 acres, adopting the acreage price of 19.6 per acre fixed in a filed report sent to the Attorney General by Assistant Secretary of the Interior Vogelsang November 9, 1917, at the request of counsel for the United States, stating that on the Eastman (Manypenny) map (Record, p. 484*a*), "the mouth of Ayoway Creek (Rec., p. 484*c*) is placed 2½ miles *too far north;* the Missouri River at Yankton 3¼ miles *too far south;* the Niobrara River at the mouth of Mauvaises (the present Verdigris, which is about the junction of the Niobrara and Missouri) River 9 miles *too far south,* and the distance *east and west* from the mouth of Ayoway Creek to the mouth of Mauvaises River 18¾ miles *too short,*" the true acreage north of Ayoway Creek within these boundaries and ceded but not paid for to claimant as shown by an official report by Assistant Secretary Sweeney of October 4, 1916, from the official surveys being 1,120,000 acres, so that the court should adopt either 820,000 acres at 19.6 cents as the amount to be paid for or 483,365 acres at 25 cents, but not each time adopt figures most adverse to claimant.

8. In denying relief to claimant for members of the tribe killed or wounded and property destroyed by a failure of the United States to fulfil its treaty obligation guaranteeing protection and allowing claimant only for horses (finding 5), notwithstanding the duty of the court to fix damages for injuries unlawfully sustained and that the Record shows the United States not many years prior to the treaty had approved an agreement between tribes living in northern Kansas or southern Nebraska that either tribe should pay the other $1,000 for each tribal member killed by members of the other tribe.

ARGUMENT.

CLAIM 1.

This claim is for land north of Ayoway Creek acquired by the United States by Article I of the Omaha treaty of March 6, 1854 (Findings 2 and 3, p. 16), whereby the United States unsuccessfully sought to induce the Omahas to act as a buffer between the warlike Sioux and Poncas north of the Missouri, and the settlers it was proposing to let into the more fertile and removed lands owned by the Omahas south of Ayoway Creek. The United States, pursuant to a general act of Congress, at the period in question, contemplating fixed Indian reservations, made land treaties with a number of tribes for the purpose of providing for the settlers who were crowding into the Missouri, Platte, and Kaw river regions. The northern Sioux barrier, west of Minnesota, had not yet given way.

The United States, for a total consideration of $881,000, agreed by the treaty aforesaid to acquire from the Omahas all their lands south of a line drawn due west from where Ayoway Creek empties into the Missouri River, which river formed the eastern boundary of Nebraska Territory. At that time all Nebraska north of the Platte River and south of the Missouri River on the east and the Missouri and Niobrara rivers on the north was occupied and claimed under the usual Indian title, and with such recognition as had come from prior treaties with them limiting their area to within these boundaries, by two titles, the Omahas and Pawnees, both inclined to become less warlike and both in fear of the more powerful Sioux, who lived north of Nebraska and under pressure from the whites were overrunning the extreme northwestern and western part of Nebraska and were in alliance with the equally powerful and warlike Arapahoe and Cheyenne Tribes who pressed the Pawnees from far western Nebraska. The buffalo ranged the sand hills of north, central, and western Nebraska and made the standard meat, raiment, and shelter of all the tribes mentioned.

The absence of any prominent water course or other natural boundary to mark the entire distance from the Platte River on the south to the Niobrara River on the north, prevented any clear line of recognized boundary between the Pawnees on the west and the Omahas on the east. By common consent and a common dread of their enemies the Pawnees and the Omahas refrained from mutual hostilities and were joined in a common cause of self-protection, each claiming, but without hostility, a certain intermediate area between boundaries or streams that each recognized as belonging to the other. Thus the large Elkhorn River was conceded to be Omaha territory, as it ran through territory villaged and hunted in by the Omahas for years, and west of the large, wide Loup Fork of the Platte was conceded to be Pawnee territory, either tribe when desiring to make a large hunt embracing the other's conceded territory requesting (and receiving, at least in later years) permission.

The intermediate and unconceded territory near the Platte on the south was to be determined by whether the Omaha boundary along the Platte River ran to Shell Creek only or ran further westward to where Beaver Creek flowed into the Loup Fork of the Platte River, the Omahas insisting and the United States apparently supporting its claim to the land as far as Beaver Creek, while the Pawness fixed the line further east, at Shell Creek. Each tribe pursued the normal course and followed a stream belonging to it northwesterly to near its headwaters and recognized that, whichever stream was the true line, the Omaha boundary then followed that stream northwestward to near its headwaters and thence creeks flowing northward into the Elkhorn and proceeded northwestward with the Elkhorn to the sand hills of Holt County, where the buffalo ranged, and thence tnrough the sand hills by a short unmarked line to the natural water course on the north, the Niobrara River, where the Omahas turned east and the Pawnees west.

When the United States came to make its treaty with the

Omahas in 1854 its representative avoided any dispute over the line between the Pawnees and Omahas, as their respective treaties show. The Omahas were urged to locate permanently north of Ayoway Creek. The Yankton Sioux then would have been their neighbors across the Missouri River on the north. The Omahas, from fear, objected, but finally yielded to an article so drawn as to relinquish, with qualification, however, all right and title to the country south of a line drawn from Ayoway Creek, due west to their, the Omahas' western boundary line, the land north to be their future reservation home. It was not deemed necessary to make a northern boundary, because the Missouri and Niobrara rivers were the recognized and natural boundary. A proviso, however, was inserted at the Indians' instance whereby they were given the right in lieu of the large reservation north of Ayoway Creek, if they insisted, to take a smaller reservation of 300,000 acres south of Ayoway Creek, in which event it was provided "then and in that case, all of the country belonging to the said Indians north of said due west line shall be and is hereby ceded to the United States by said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

The treaty on its face shows that both parties recognized there was a materially greater area of land north of the Ayoway Creek line than 300,000 acres. It is now conceded the Omahas never have been paid for the excess. What their recovery in dollars and cents shall be obviously depends on how much land was north of the line, to be paid for, and also how much land was south of the line, so as to fix the acre price (though the Indians insist under all the circumstances they should be paid $1.25 per acre, the price to settlers).

A determination of the land area obviously and necessarily depends on where was the western Omaha boundary line. The Court of Claims, as both parties to the controversy

from motions already filed in this court admit, took the western line and accepted calculations based thereon, by adopting as the western boundary a north and south line drawn due south from the confluence of the Niobrara and Missouri rivers. (See United States motion to remand the cause, page 5, last paragraph.) It did this on the theory that the Omahas and not the Poncas owned north of Ayoway Creek and of acknowledgment by the United States that the line ran at least as far west as the confluence of the Missouri and the Niobrara, inasmuch as the commissioner negotiating the treaty on the part of the United States, Mr. George W. Manypenny, then Commissioner of Indian Affairs, in August, 1854, had approved a map made by Captain Eastman of the United States Army on which was located the new Omaha Indian reservation (proposed since the Indians refused to take and elected a small 300,000-acre reservation south of the Ayoway Creek line instead), the said reservation being shown as beginning in the southeast at the mouth of Ayoway Creek in the Missouri River and thence following the Missouri north and then west to its confluence with the Niobrara River, thence by a due north and south line to a point where a due straight line from west to east would bring the boundary line to a place of beginning.

That the Court of Claims erred as to claimant Indians' rights to have its true western boundary line judicially determined (however much the United States may be limited from asserting the line was farther east by this endorsed map of its negotiator and Indian Commissioner), treating said map only as one piece of evidence and not as concluding the subject as did the court below, would seem to be clear inasmuch as it took two parties to make a treaty (this being prior to the statute of 1871 abolishing Indian treaties and at a time when this court held an Indian treaty to be a contract of mutual consent, Michel *vs.* U. S., 9 Peters, 746; Choctaw Nation *vs.* U. S., 119 U. S., 1-39) to be interpreted in case of

doubt most favorably to the Indians. Minnesota *vs.* Hitchcock, 185 U. S., 396.

Manypenny and the Indian Office, However, Acknowledged the 1854 Map Was Not Final.

But, though the United States is bound by the Manypenny map to the extent that it cannot deny the Omaha title extended from the Ayoway Creek line north to the Missouri River and excluded any defense based on the counterclaim alleging the land *belonged* to the Poncas and not to the Omahas and westward as far as the confluence of the Niobrara and Missouri rivers (see Manypenny map reproduced at the end of this brief), even if it were true that a definite and final decision by the United States that the lands it was acquiring from the Omahas by the treaty of 1854 extended westward only as far as a line drawn south from the confluence of the Niobrara and Missouri rivers, the fact is that *Commissioner Manypenny himself did not treat this map of 1854 as definite and final, but merely as provisional and tentative.* He considered it simply as establishing a west line to which the Omaha reserve unquestionably would extend if the Omaha Tribe's reluctance to settle north of Ayoway Creek could be overcome, and if not as establishing a west line and an area that could be safely considered as open to public settlement as newly acquired public lands, leaving for future and more accurate determination the question how much further westward the Omaha western boundary ran before meeting the Pawnee eastern boundary.

This is conclusively shown by an official letter which this court may consider under the authority of the case of New York Indians, 170 U. S., 1 (and in the record below at page 478), written by George W. Manypenny, Commissioner, advising a proper settler as follows under date of the Department of the Interior, *July 7, 1856:*

> "The title to the country lying north of said first-mentioned line became, therefore, by such new assignment (that of the Omahas to a 300,000-acre reservation south of Ayoway Creek), vested in the United States, and the lands subject to all the laws affecting the settlement and sale of the public lands in Nebraska territory.
>
> *"The western boundary of what was the Omaha country has not been definitely settled."*

That the United States, however, recognized that the western boundary was *west* of the confluence of the Niobrara and Missouri rivers and at some as yet unascertained and unsurveyed point on the Niobrara River is conclusively shown by the treaty, which may be judicially noticed, between the United States and the Pawnee Tribe of Indians negotiated by Indian Commissioner Denver, September 24, 1857 (11 Stats., 729; 2 Kappler, 764), which by article 1 acquired from the Pawnees all their lands bounded as follows:

> *"On the east by the lands lately purchased by the United States from the Omahas;* on the south by lands heretofore ceded by the Pawnees to the United States; on the west by a line running due north from the junction of the North with the South Fork of the Platte River, to the Keya-Paha River; *and on the north by the Keya-Paha River to its junction with the Niobrara, L'eau qui Court, or Running-Water River, and thence, by that river, to the western boundary of the late Omaha cession.* Out of this cession the Pawnees reserve a tract of country, thirty miles long from east to west, by fifteen miles wide from north to south, including both banks of the Loup Fork of the Platte River; *the east line of which shall be at a point not further east than the mouth of Beaver Creek.* If, however, the Pawnees in conjunction with the United States agent, shall be able to find a more suitable locality for their future homes, within said cession, then they are to have the privilege of selecting an equal quantity of land there, in lieu of the reservation herein designated, all of which shall be done as soon as practicable."

This evidences absolutely that the *northwestern* boundary line of the Omahas was at a point on the Niobrara River west of and not at the confluence of the Niobrara and Missouri rivers as shown on the Manypenny tentative map of 1854 and was so acknowledged by the United States and that the *southwestern* boundary of the Omahas ran to the *mouth of Beaver Creek*, which creek lies, as shown on the map attached to this brief and reproduced from the printed official map of the State of Nebraska of 1908 in the General Land Office, throughout its entire course *west* of the confluence of the Niobrara and Missouri rivers and runs northwesterly. The Omaha Indians traversed it as their boundary to near its headwaters under the necessity of keeping near wood and water and then from the headwaters marched to streams entering the Elkhorn and thence northwesterly by the Elkhorn to the sand hills near the headwaters of the Elkhorn and thence by march to the Niobrara—the divisional point on which, as both Omaha and Pawnees treaties show, is not stated in either treaty (probably for lack of surveys), but obviously was west of the town of Oneill as testified orally and miles beyond the confluence of the Niobrara and the Missouri.

That the Pawnees recognized and acknowledged the United States had found and conceded the Omaha southwestern boundary to extend to Beaver Creek is shown in the annual report of the Commissioner of Indian Affairs for 1856 (p. 106), which the court, on the authority of The New York Indians, 170 U. S., 1, may judicially notice, which incorporates the following report to the Indian Office by Samuel Allis, Pawnee official interpreter:

"The land *the whites are settling on* near the Pawnees has been bought of the Otoes and Omahas; but the Pawnees complain of the Omahas having sold land to the Government which belongs to them, which I am satisfied is true; I have been 23 years in the country and I have always understood that Shell Creek was the dividing line between them and the Omahas, and the Omahas sold to Beaver Creek,

which is a difference of forty miles up the Platte, and this is a great cause of dissatisfaction with the Pawnees"—the report concluding with a recommendation to make a treaty with the Pawnees.

It is submitted that this court either should examine and fix the boundaries from the whole record and the area within the same north of Ayoway Creek, and also south of that creek, so as to determine the price, or should give to the Court of Claims such appropriate directions as will result in the court below ascertaining the correct boundary lines as shown by stream courses and not accepting as conclusive the Manypenny longitudinal straight western line and its errors as to locations and distances as controlling the areas to be found.

Thus the court below, accepting the Manypenny map as conclusive, adopted the area of 783,365 acres as north of that line as reported by the General Land Office (Original Record, p. 297) from the map in Royce's Indian Land Cessions (taken from the Manypenny map) and following its errors as to locations and distances, notwithstanding the Assistant Secretary of the Interior, in response to claimant's call under date of November 14, 1916, reported that taking the lines and streams shown on the Manypenny map north of Ayoway Creek, the Mauvaises Terres River being the present Verdigris River, which flows into the Niobrara at or near its confluence with the Missouri, the area north of the Ayoway due west line to the Missouri was 1,120,000 acres, or a true excess above the 300,000 acres allotted to the Omahas of 820,000 acres, the Interior Department's report stating:

> "The area of the Omaha reservation, taking a line running due west from Ayoway Creek to Mauvaises Terres River, and thence down said stream, and the Niobrara and Missouri Rivers to the mouth of Ayoway Creek, according to said map of 1854, as the boundaries, it is approximately 1,750 square miles, or 1,120,000 acres, using the boundaries of said

Omaha reservation indicated on the map as above set out, the area is approximately 9,825 square miles or 6,288,000 acres."

And this error of treating the Manypenny distances and longitudes as conclusive, regardless of the fact that the official surveys of Nebraska, later made, established Mr. Manypenny's mathematical inaccuracies on the basis of the streams he had recognized as boundary lines, was followed, although, in response to an informal request of the attorney for the United States, the Department of the Interior, on November 9, 1917, reported to the Attorney General as follows (Original Rec., p. 484C):

"At Mr. Anderson's request examination has been made of said map of Eastman (approved by Manypenny in August, 1854) with reference to its accuracy so far as the lands in dispute are concerned. On the Eastman map the mouth of Ayoway Creek is 39½ miles north of the 42d parallel of north latitude, while, according to the General Land Office map of the State of Nebraska for 1908, the distance is 37 miles, a difference of 2½ miles. The Missouri River, near the city of Yankton, is 56 miles distant from said 42d parallel, according to the Eastman map, and 59¼ miles, according to the State map mentioned, a difference of 3¼ miles. The Niobrara River, at the mouth of Mauvaises River, is 39 miles distant from said 42d parallel, according to the Eastman map, and 48 miles according to the State map mentioned, a difference of 9 miles. Taking an east and west line from the mouth of Ayoway Creek to the mouth of Mauvaises River, the distance on the Eastman map is 53¾ miles, and on the State map, from the mouth of Ayoway Creek to a line due south of the mouth of said Mauvaises River, now called Verdigris River, the distance is 72½ miles.

"Accordingly, it appears that on the Eastman map, the mouth of Ayoway Creek is placed 2¼ miles *too far north;* the Missouri River at Yankton, 3¼ miles *too far south;* the Niobrara River, at the mouth of

> Mauvaises River, 9 miles *too far south*, and the distance east and west from the mouth of Ayoway Creek to the mouth of Mauvaises river 18¾ miles *too short*."

The Court of Claims, however, while following the Eastman-Manypenny erroneous distances and allowing claimant only 483,365 acres instead of 820,000 acres, still further cut down the claim by refusing the price of 25 cents an acre reported on the basis of the Eastman-Manypenny errors as to distances and allowed only 19.6 per acre on the basis of the later calculations based on the State-map distances. Obviously, this was without justification in any view that can be taken.

On the basis of the Beaver Creek line the acreage would be 1,300,000 acres or an excess of 1,000,000 acres.

It may, however, be claimed that this court must accept the findings of the Court of Claims as conclusive and in the nature of a special verdict of a jury, U. S. *vs.* Smith, 94 U. S., 214. Further, that this court cannot say from Finding III what lines the Court of Claims adopted as the boundary of the Omahas north north of Ayoway Creek. It is submitted that counsel for both claimant and the United States in motions heretofore filed agree that the Manypenny map was regarded by the court below, and moreover that this court is entitled to know and have findings as to the boundaries adopted for the Omaha provisional reserve north of the Ayoway Creek line, and, moreover, that it is entitled to take the Pawnee and Omaha treaties both together and on their basis have appropriate findings made. This, aside from its right under United States *vs.* Old Settlers, *supra*, to review the whole Record.

Before closing this branch of the case counsel for claimant to anticipate a possible point that the United States may raise as to the Omaha treaty showing on its face, by providing for an exploration, that the area north of Ayoway Creek did not belong to the Omaha, will state that the United States

attempted a defense below by means of inserting in the record below an affidavit made by one Griffy, claiming to have been employed by the agent for the exploratory trip, in December, 1855, that Logan Fontanelle, principal chief of the Omahas, when Ayoway Creek was reached remarked that it was useless to cross the creek (Orig. Rec., 286) "as he knew the country well, and that he, as the principal chief and business agent of the Omahas, refused to accept it," and would take no other place than their present 300,000-acre reservation at Blackbird Hills, and that both Fontanelle and the agent made the trip, but merely, they stated, to fulfill instructions from the President—this affidavit, showing on its face, it was made to aid a "sooner," who had staked a claim on Blackbird Hills before it was settled, what lands the Omahas would take as others did as "sooners" with reference to the Ayoway Creek country.

With reference to so much as may be made of a contention, advanced below, that the United States should not be bound by the Manypenny map and its acknowledgment that the land between Ayoway Creek and the Missouri River belonged to the Omahas and not to the Poncas, it is submitted that on this point the case, if necessary, could be submitted on the authority of The United States *vs.* Brooks, 10 Howard, 442-59, wherein the court approved this instruction:

> "That the United States, by treating with the Caddo Indians for the purchase of their lands, recognized in said Indians a right to said lands, similar to the rights to lands generally recognized in Indian Tribes with whom the United States have made treaties."

Claimant, however, did not so rest but by means of the Nicollet-Fremont map of 1840, Morse's map of Nebraska Territory of 1856, historical data, official government reports and oral testimony established clearly the Omaha Tribe as exclusively entitled to eastern Nebraska to the Pawnee line and that the Poncas *belonged* north of the Missouri and the

Niobrara. The attempt to introduce the Poncas by means of a counter-claim was only adopted after it was seen that a claim in behalf of the Otoes and Missourias, living *south of the Platte* would not aid the United States, the jurisdictional act at the request of the Indian office having given the Otoes and Missourias leave to intervene in the case but nothing coming of it, as nothing did come in evidence of the contention advanced to the committee of Congress, which heard the Omaha Tribesmen personally and in response to their earnest insistence for 40 years for payment sent the case to court for final judicial settlement, notwithstanding the Indian office said that while the treaty article on its face would show support for the Indians claim their treaty rights had been ignored and promises of payment not kept, the matter had "been covered by some general settlement or course of dealing between the Government and said Indians" (House of Reps., Report No. 1427, 60th Congress).

INTEREST SHOULD BE ALLOWED ON THE LAND CLAIM.

The Court of Claims as heretofore shown originally allowed interest at 5 per cent on the amount found by it to be due under the Ayoway Creek land claim and then on motion of the Government counsel without argument eliminated it from its conclusion of law and its judgment.

The action of the court was based on the following provision of the act of March 3, 1863, creating the Court of Claims, carried into the Revised Statutes as section 1091 and into the Judicial Code as section 177:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for payment of interest."

It apparently is conceded that but for this statute interest would be allowed. The Omaha Tribe respectfully submits

to this court that this statute does not constitute a bar in this case and that under the terms of the jurisdictional act this case comes within the principles of equity where interest is usually allowed, notwithstanding that a common law interest is not allowed and within principles applied by this court in other cases where it has allowed interest notwithstanding the statute just quoted:

By the jurisdictional act the Omaha Tribe was granted the right to sue the United States on "all claims of whatsoever nature" for determination of the amount "due" the tribe under the treaty of 1854 or other laws or treaties, or for "misappropriation of tribal funds," or "for failure of the United States to pay said tribe any money due. The court was authorized to determine "all legal and equitable claims, if any, of said Omaha Tribe of Indians against the United States, and also any legal or equitable defense, set off, or counter-claim which the United States may have against said tribe, and to enter judgment thereon." The act further conferred "authority to settle the rights, both legal and equitable," of both parties regardless of statutory limitations and provided judgment and satisfaction should be "a full settlement" of all tribal claims.

In other words, the purpose of the act plainly was to have a final accounting and final settlement, and not to leave open for the future a claim to interest. What is within the plain intendment and purpose of an act is as much within its provisions as though directly expressed. It clearly was not the intention of Congress to impose interest or other restrictions on judicial accomplishment of full and complete justice under legal and equitable principles.

The United States occupies a relation of trust to the Indians which renders of little value authorities in general cases. As to the Indian tribes the rule is that the United States is, as stated in United States *ex.* Old Settlers or Western Cherokees, 148 U. S., 427, "desirous as the stronger party to the

controversy that that superior justice which looks only to the substance of the right should be done in the premises."

While at the common law interest was not allowed in the absence of a statute, the rule in equity always has been exactly the contrary. By conferring equity jurisdiction Congress conferred the incidents of equity jurisdiction.

> "In equity, interest goes with the principal as the fruit with the tree" (Himely *vs.* Rose, 5 Cranch, 313-19).

Counsel does not overlook Tillson's case, 100 U. S., 43, where the court held that equity jurisdiction was not conferred by reason of the fact that the case was referred to the Court of Claims to determine and adjudge "the amount equitably due" Tillson, the court saying, "To our minds the word 'equitably' means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants"; and it was for this reason it refused to allow Tillson interest.

When the Omaha treaty was made, the only mode whereby the United States could take, lawfully, possession of Indian lands was by consent of the Indians and if consent was given on conditions, fulfillment of those conditions was an essential requisite of the taking (U. S. *vs.* Clark, 9 Peters, 168), and where, as in the Omaha treaty of 1854, the amount remained unascertained and provision was not made as to disposition of the money when the land area and price should be ascertained, such ascertainment within a reasonable time, the creation of a trust in the meantime and credit of the trust funds on the books of the treasury at interest as provided by the general law as to Indian funds was as much a part and incident of the treaty as though expressed therein.

By the treaty of 1854 (10 Stats., 1043) the United States took title to the lands north of Ayoway Creek in trust: 1, to hold it as a home for the Omahas in the event the latter

would agree to accept the reserve as their future home; 2, if the Omahas would not so agree, but elected to live south of Ayoway Creek, then to carve out a reservation of 300,000 acres for the Omahas south of Ayoway Creek, the tract to the north to cease to continue lands of the Omahas upon, but only upon, the United States paying the Omahas for the same, less the 300,000 acres selected south of the Creek (article 1), whereupon the funds to be ascertained became trust funds due and held by the United States as in any other resulting trust.

The payment for the excess acreage north of Ayoway Creek was a condition to the United States acquiring the tract and without payment no acquisition of the same could be made. The condition on the part of each party was concurrent and the title to the United States in the lands can be upheld only on the theory that equity considers as done (Seymour *vs.* Freer, 8 Wall., 202-14) that which it was agreed should be done and that the purchase money was, potentially, in the treasury of the United States and there held, as all other Indian trust funds, for the use and benefit of the Indians and at interest at the fixed rate of 5 per cent per annum.

If this theory, which requires that interest be allowed, be not adopted, then the court is remitted to the doctrine, more disadvantageous still to the United States, that the assumption by the United States of title to the land, *without compliance with the concurrent condition of payment for it to the Indians*, and its sale by the United States to settlers was a breach of trust requiring the United States to account to the Omahas for the moneys realized from such sales, the minimum sale price being $1.25 per acre, or less than the court has allowed, including interest.

The trust relation in which the United States originally stood to this tract in controversy, in other words, once existent could be terminated and the right of full ownership succeed the trust relationship only by payment.

A trust in its technical sense is an obligation on a person

arising out of the confidence reposed in him to apply property faithfully and according to such confidence.

> Weltner *vs.* Thurmond, 98 Pac., 590.
> Macwell *vs.* Wood, 111 N. W., 203-4.
> First State Bank *vs.* Sibley Co. Bank, 96 Minn., 456.
> Allen *vs.* Rees, 8 L. R. A. (N. S.), 1137.

The United States may be trustee and, while it cannot be sued without its sovereign consent, that consent given causes application of the general principles of law and equity.

Perry on Trusts, Sec. 41, says:

> "The United States and each one of the separate States, may sustain the character of trustees. They have legal capacities to take and execute trusts for every purpose. But a court cannot execute its judgments and decrees against a sovereign State with any more effect than the courts of England can enforce their orders against the King. The arms of equity in America are as short against the sovereign power as they are in England against the prerogative. Mr. Justice Gray has clearly shown that a State cannot be sued in law or equity against its consent, or unless there is some general or special statute authorizing the suit. A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused."

When by the Omaha treaty the lands north of Ayoway Creek were transferred to the United States they were received in trust and the proceeds became subject to operation of the general laws governing Indian funds.

The act of January 9, 1837 (sections 2095 and 2096, Revised Statutes), provided:

> "Sec. 2095. All investments of stock, that are or may be required by treaties with the Indians, shall be made under the direction of the President; and

special accounts of the funds under such treaties shall be kept at the Treasury and statements thereof be annually laid before Congress.

"Sec. 2096. The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum."

The act of September 11, 1841 (section 3659), provided:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum."

This public policy of accounting to the Indians as to *cestuis que trust* who shall be protected against loss has been steadfastly adhered to by the United States, despite whatever lapses there may be due to ignorance, oversight or acts of subordinate officials.

Thus the act of April 1, 1880 (21 Stats., 70), provided:

"That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian Tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments;

> And the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress."

Indian appropriation act of August 15, 1894 (21 Stats., 286):

> "Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the several Indian Tribes interested therein, the face value of certain non-paying State bonds or stocks, including certain abstracted bonds described on pages one hundred and fifty-three and one hundred and fifty-four of Annual Estimates for the fiscal year ending June thirtieth, eighteen hundred and ninety-five (House executive document numbered five, Fifty-third Congress, second session), to draw interest at the rate of 5 per cent per annum, as provided by the act of April one, eighteen hundred and eighty; and thereupon said State bonds or stocks shall become the property of the United States."

Or, as expressed by this court in Minnesota *vs.* Hitchcock, 185 U. S., 396:

> "The recognized relations between the parties to this controversy, is that between a superior and an inferior, whereby the latter is placed under the care of and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice

> which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The United States, then, having a trust relationship to the Indians and these lands in 1854, and having no lawful right to take the lands and dispose of the same to settlers with a good title except upon the condition it had concurrently paid the Omaha Tribe for the same by causing the price thereof to be placed in the United States Treasury to their credit at 5 per cent interest, was this situation and liability as of 1863 for interest altered and reversed, the United States now having at last as a sovereign nation permitted suit to be brought to determine its liability after having meanwhile enacted the act of March 3, 1863 (section 177 of the Judicial Code):

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It is submitted that the Omaha Jurisdictional Act did not contemplate that full and exact justice should be prevented by the foregoing, but that a final settlement and accounting should be made unrestricted by this general statutory provision. The reason for this statute and for the rule of non-allowance of interest by the sovereign is, as expressed in U. S. *vs.* Verdier, 164 U. S., 213-19, grounded on a public policy that the sovereign should occupy a favored position in its dealings with its individual citizens and accordingly it is held that the "equities which arise as between individuals have but a limited application as between the Government and a citizen."

But, with the reason for the rule ceasing the rule should cease. The situation is, as this court always has announced,

reversed when it comes to dealing between the United States and the dependent Indian Tribes with which it made treaties, where it stood in the position of a trustee, guardian and protector and should be astute for its own honor not to take advantage of the weak, unlearned, and helpless savages.

The situation is not even as it has been since the act of March 3, 1871 (section 2079, Revised Statutes) under which the United States undertakes to do of its own motion with Indian lands that which it deems proper:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States Government may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, *shall be hereby invalidated or impaired.*"

The case of U. S. *vs.* Sherman, 98 U. S., 565, when carefully considered, with the reasons shown by the opinion rendered to underlie the conclusions reached by the court, does not, it is submitted, sustain a contention that the United States is not liable for interest in the instant case. In the Sherman case the claimant had recovered a judgment under the Captured and Abandoned Property Acts of March 12, 1863 (12 Stats., 820), and July 2, 1864 (13 Stats., 375), against an agent of the United States. Under the acts in question express provision was made that interest against the United States should date from the time when a certificate of probable cause for the seizure by the Federal agent should be given and claimant was allowed such interest. Claimant, however, by mandamus sought to compel payment to him of interest between the date of judgment and issuance of the certificate of probable cause.

This court said:

> "Before that time (the date when the certificate was given) the Government is under no obligation,

> and the Secretary of the Treasury is not at liberty to pay, * * * Whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes. Certainly there was no delay in the present case. The Government paid the amount recovered against Callicott, viz., the sum for which the verdict and judgment were given, as soon as its liability accrued. If there has been a loss of interest, it is not due to the Government. It is due to the dilatoriness of the relator himself. * * * It would be strange, indeed, if by his own delay he can compel the United States to pay interest on a judgment which it was ready to pay as soon as its liability occurred."

In the instant case the treaty was that of the United States, the act that of the sovereign and all that followed not the failure or delay of some official. Indeed the sovereign had provided law whereby the money should be potentially at interest in the Treasury and if it be not so, in fact, it is because of neglect of an agent to carry out the ~~natural~~ National will and purpose.

This court, notwithstanding the Court of Claims statute set forth the general principle as to a nation's liability for interest, has not hesitated to allow interest.

In U. S. *vs.* McKee, 91 U. S., 422, the court affirmed the action of the Court of Claims in allowing interest on a draft given to Col. Francis Vigo by Gen. George Rogers Clarke in 1778. The matter of interest was the only really contested point on appeal. The Supreme Court, notwithstanding the act of March 3, 1863, held that the rule that the United States should not be liable for interest was not uniform. It said that the jurisdictional act in McKee's case had removed the statute of limitations and had directed the court to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases,"

and that in cases like McKee's under an act of 1790 interest had been allowed; that the draft was one which between individuals bore interest and that it saw "no reason why it should not be paid in full with all its legal incidents."

Crescent Min. Co. *vs.* Wasatch Min. Co., 151 U. S., 317, an individual case.

In this case the Wasatch Mining Co. and one Jennings were in litigation over a certain tract. The Crescent Company purchased whatever rights Jennings had, an escrow agreement being made. Later the Crescent Company purchased the rights of the Wasatch Company and an agreement was entered into in the nature of a mortgage, the former agreeing to pay $45,000 in one year absolutely if within that time the Jennings suit should be decided in favor of the Wasatch Company. If the suit should still be undetermined, the purchase money was to be paid into court. The suit continued undetermined and, the money not being paid into court, the Wasatch Company brought a foreclosure suit, claiming the amount due with interest.

The defense was, among others, that no order of court had been made for payment of the money into court and that no provision was made for interest.

Held:

> "Further objection is urged to the decree of the court below in that it called for the payment of interest on the principal sum from the time fixed for payment until the same shall have been paid into court. It is said that the mortgage does not itself provide for interest, and that if the money had been paid into court it would have there remained without interest. But this is not necessarily so. The court would, doubtless, if so requested by the parties in interest, have ordered so large a sum invested. At all events, it is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court."

Similarly, it may be noted that in the instant case the United States took the lands, to which it had no right until payment contemporaneously with acquisition of the lands involved, sold the lands, appropriated the proceeds to its own use and, it is now contended, is not liable for interest on those proceeds or any sum whatsoever, though itself obtaining interest.

The decision in Crescent Co. *vs.* Wasatch Co., *supra*, was affirmed in Spalding *vs.* Mason, 161 U. S., 275-96, as but a dictate of natural justice and the law of equity in every civilized country, the court adding:

> "The circumstance that the complainant may have considered himself entitled to an account and to receive a greater sum than was actually found to be due does not affect complainant's right to the interest upon what was really due."

When the treaty of 1854 was made, it was an agreement between one sovereignty with another dependent sovereignty, and in the case of the Republic of Colombia, 195 U. S., 24, the court held the submission of the sovereignty's case to our tribunals was a full submission, including therein the right to allow interest.

> U. S. *vs.* Old Settlers or Western Cherokees, 148 U. S., 427.

The jurisdictional act referred this claim to the Court of Claims with right of appeal to the Supreme Court, which held that as a court provided for by the Constitution it could not be made an arbitration tribunal, "it being the intention of this act to allow the Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, *legal and equitable, both* of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in such cause and render final judgment thereon."

The court held the foregoing conferred equity jurisdiction

and that the "unrestricted latitude" was that of courts of equity under principles of equity, found a sum due and held that notwithstanding the statute as to non-allowance of interest there should be interest allowed.

In United States *vs.* State of New York, 160 U. S., 598, the Court of Claims, on the ground that it was prohibited by the statute creating it from allowing interest prior to judgment by it and also "on the general rule based on grounds of public convenience that interest is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers," disallowed a claim of the State of New York for $91,320.84, representing the amount the State had paid to a State canal fund as interest on moneys borrowed from the canal fund for the purpose of raising troops for defense of the Union in the Civil War. This court reversed the court below and allowed the claim on the ground that, liberally interpreted, the acts of Congress passed "to indemnify the States for expenses incurred by them in defense of the United States" created an obligation to indemnify the States for any costs, charges and expenses properly incurred for the purposes expressed in the act and that interest paid to its own canal fund was such a cost or expenses as much as moneys directly within the provisions of the act.

The Non-Allowance of Interest on the Item of $18,202.19.

Interest on this item, covered by findings 4 and 7 (pp. 17-18), was first allowed and then the action rescinded. It seems to need no argument that allowance of the amount stated was proper. What has been heretofore set forth as to interest is here reiterated.

FINDING 5, FAILURE TO AFFORD THE OMAHAS THE PROTECTION GUARANTEED BY ARTICLE 7 OF THE TREATY OF 1854 AND CONSEQUENT INJURY.

The Omaha Tribe have been found by the Court of Claims (p. 17) to have been guaranteed protection against the Sioux and other hostile tribes by article 7 of the treaty of 1854. The court has found repeated attacks were made shortly after the Omahas had established themselves in their new, fixed, reservation home; that they called for protection as provided by the treaty, were furnished none, that protection was necessary, and not being afforded some 22 Omahas were killed and 152 horses stolen by the Sioux marauders. This plainly was a breach of the express treaty provisions and would seem on all legal principles to call for legal redress.

The Court of Claims has allowed a very moderate recovery for horses only. It has found nothing as to the wounded, of whom the record shows more than forty, and disposes of the claim of the tribe for damages for deaths of its members by saying merely it does not appear "what price one tribe should pay to another for killing a member of the tribe" (p. 17).

The court apparently disposed of this phase of the case on the theory it was against the Sioux Tribe. The claim, however, was one against the United States for breach of a contract of guaranty. The breach being admitted some damages should have been awarded. The court below apparently thought it could fix a value on horses, but not on the life of an Indian. The fact that the killed were tribal members, however, no more absolves the court from using its best judgment with the light before it than is a court in any personal injury case. It had before it the following evidence as respects the United States, taken from the Annual Report of its Commissioner of Indian Affairs for 1842, page 65:

> "I am happy to report that both Otoes and Missourias have cheerfully assented to the regulation of *the Department 'for preventing* depredations among the Indian tribes,' provided the neighboring tribes shall place themselves under a like obligation; and they have recently entered into an agreement with the Delawares whereby they have mutually bound themselves to pay a forfeiture of $1,000 for any murder committed by the Indians of either tribe on those of the other.
>
> "I have not yet had an opportunity of submitting the regulation above referred to to the Omahas and Pawnees; I, however, anticipate no opposition from either tribe to its adoption."

The Omahas just before the treaty was made had been compelled by a Sioux incursion to make their home near Bellevue in the southern part of their reservation, to keep together, and to use the balance of their lands for hunting, keeping a sharp lookout for the Sioux, and banding together with the Pawnees if danger were to be apprehended. They absolutely refused, despite pressure continued over nearly two years, to establish a permanent reservation and keep on it steadily, north of Ayoway Creek, and thus invite Sioux attacks. They yielded reluctantly to becoming reservation Indians south of Ayoway Creek, knowing well it was part of Sioux Indian policy to attack any Indians who became treaty reservation Indians, and that the Sioux would redouble their attacks once they learned what the Omahas had done. The consideration offered by the United States was "protection," and this agreement was broken.

Had there been some show of protection or had it been afforded for a time and then discontinued it might be argued that the President was clothed with a discretion and exercised it; that he considered protection no longer necessary. But the attacks began immediately after the Omahas removed and continued and no protection ever was given. The words of the treaty meant something. To hold that the phrase "so

long as the President deems necessary" requires a presumption the President acted and deemed protection never necessary is to render the article meaningless and valueless to the Indians.

As to the value to the tribe of loss of life or injury of its members, the fact there is no rule of thumb measure of such damages places more responsibility on and gives the court a wider range of action, but does not relieve it of the duty of declaring damages. It was shown that the Indians at this time lived a communal life. Each tribal member was a tribal asset, in hunting the common food, in protection against hostile Indians, and in continued preservation of tribal title to the lands since Indian ownership depended on tribal existence and occupancy.

It is submitted that the amount asked of $1,000 per member is moderate and should have been allowed by the court below and by this court.

Finding 8, Reimbursement for Worthless, Dying Cattle Never Issued.

This item of the Court of Claims, while below the proper amount, was allowable and should remain. It is strictly in accord with the ruling in Chickasaw Nation *vs.* The United States, 22 Court of Claims, 250-251.

Finding 9, Reimbursement for Cost of an Infirmary.

This infirmary, which, as Indian Inspector Pollock once reported, was a worthless, never-used structure that stood as a "monument to error" was an instance, as found, of misuse of Indian funds in violation of treaty provisions. The United States, it is submitted, are legally and equitably liable for the loss.

Claimants Have Moved the Whole Record Should be Certified and Reviewed.

Counsel know the reluctance of this court to be burdened with an entire record instead of merely findings of fact from the Court of Claims. They believe, however, as hereinbefor outlined, that on the whole record the Omaha Tribe would be found entitled to a much larger recovery than awarded by the Court of Claims, and that it is a case in equity, where the rule as to certification of findings of fact merely does not obtain.

The suit is one for an accounting, involving a number of complex matters of account and as such would be cognizable in equity ordinarily.

The jurisdictional act in terms conferred equity jurisdiction.

The suit, among other matters, involves trust relationships.

In equity and in an equitable accounting the rights of petitioner are greater than in a proceeding strictly at law and the jurisdictional act so recognized.

In the case of The United States *vs.* Old Settlers, 148 U. S., 427, it was held that where the jurisdictional act provided: "it being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined," it was evident equity jurisdiction had been conferred and equitable principles should apply, and that in such a case the full record on appeal, including testimony taken, should be transmitted and not merely findings of fact.

The full record will disclose the lack of basis for assertion that the Ponca Tribe prior to or in 1854 had rights south of the Missouri and Niobrara rivers. It will show conclusively the Omahas had lawful claim by Indian title and by official

recognition to all land south of the Missouri and the Niobrara rivers, and should be paid for some hundreds of thousands acres more than 473,000 acres, and that counsel for claimant erred at the outset in claiming only 500,000 acres by following incorrect reports, made to Congress by the Indian Office. The Omaha ownership is established by official and authentic maps, by official reports and documents, State histories, and oral evidence that speaks its verity and accuracy.

Respectfully submitted,

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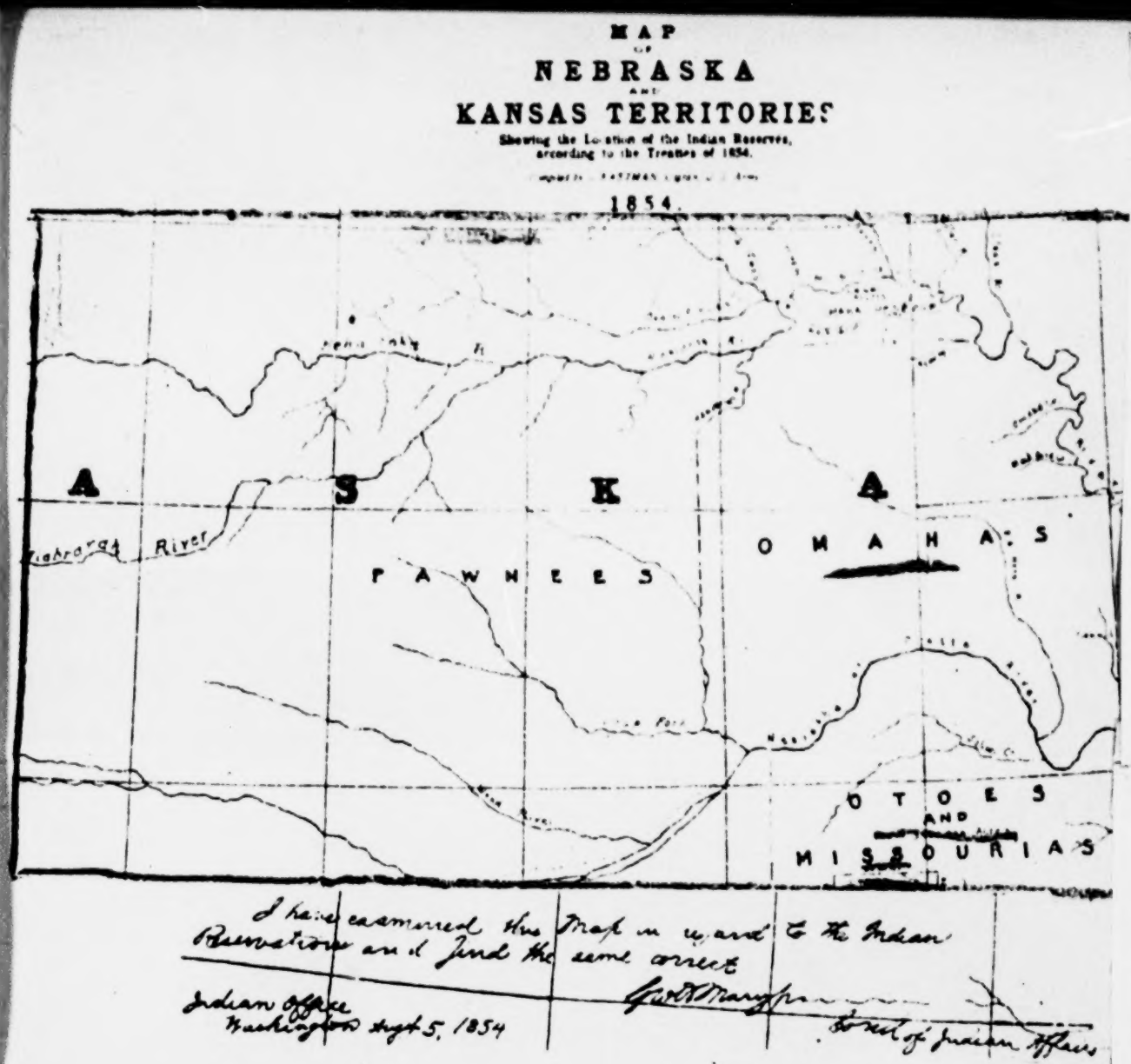

Note: The words in the northern or top of this map immediately beneath the words "Mi river" are "Omaha Reserve", and the dotted lir the "Ayoway Creek" line but places the "Niobr